



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Commercial Drapery Contractors, Inc.

File: B-271222; B-271222.2

Date: June 27, 1996

Alan M. Grayson, Esq., and Victor A. Kubli, Esq., Law Offices of Alan M. Grayson, for the protester.

C. Joseph Carroll, Department of Justice, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's issuance of purchase orders for draperies from a Multiple Award Schedule Federal Supply Schedule (FSS) vendor at higher prices than offered by other FSS vendors that could have satisfied the agency's requirements, based on the agency's need for urgent delivery which only the selected vendor assertedly could satisfy, was improper where the urgency was caused by the delays incident to the agency's prior improper issuance of purchase orders to the same vendor for the same requirement and the subsequent cancellation of these orders in response to prior clearly meritorious protests.

DECISION

Commercial Drapery Contractors, Inc. protests the issuance of purchase orders by Federal Prison Industries, Inc., doing business as UNICOR, to Contract Decor, Inc., for the supply of fabric and the installation of draperies under Contract Decor's Federal Supply Schedule (FSS) contract for draperies.

We sustain the protests.

The draperies were ordered by the Department of Veterans Affairs (VA) for its new Extended Care and Rehabilitation Center in Baltimore, Maryland. Specifically, VA needed delivery and installation of cubicle curtains and various decorative window top treatments no later than April 30, 1996, in time for the opening of its new facility. The VA contracting officer determined that UNICOR was a mandatory source for the draperies under 18 U.S.C. § 4124 (1994) and Federal Acquisition Regulation (FAR) § 8.602(a), which require government agencies to purchase supplies listed in UNICOR's schedule so long as the prices charged do not exceed current market prices. Draperies are on the schedule although UNICOR does not itself supply the fabric, which is cut and sewn into draperies at UNICOR's drapery

factory, or perform the installation of the finished products. On September 14, 1995, VA issued purchase orders to UNICOR for the top treatments and the curtains, in the amounts of \$76,818.06 and \$49,530, respectively. UNICOR permits the ordering agency to specify an FSS contractor for the furnishing of the drapery fabric and the installation of the finished products. VA selected Contract Decor and its purchase orders to UNICOR referred to a quotation from Contract Decor for the specified fabrics, sizes, design, and colors, and required that the draperies be ready for installation in April 1996.

On November 30, 1995, UNICOR issued Contract Decor purchase order No. 042-PID-124-96-CS-00 for the window top treatments and purchase order No. 042-PID-0123-96-CS-00 for the fabric for the cubicle curtains from Contract Decor's Multiple Award Schedule FSS contract. On December 18, Commercial, another FSS contractor for draperies, protested the issuance of the purchase orders to Contract Decor, alleging that the agencies failed to make award to the vendor with the lowest price available under the FSS.

In response to the protests, UNICOR found that the purchase orders were improperly issued because neither it nor VA had considered prices from other FSS vendors as required by FAR § 8.404(b), (c). UNICOR informed our Office on January 29, 1996, that it intended to cancel the purchase orders and requested that we dismiss the protests as academic, which we did on March 12.

Meanwhile, UNICOR determined that to ensure delivery of the draperies to the VA facility in April, as required, it needed the fabric supplied to its drapery factory no later than March 19. UNICOR's drapery factory manager and another contracting official telephoned Contract Decor, Commercial, and two other FSS vendors on February 2 to inquire as to the availability of the specified fabrics and the earliest date the material could be delivered to UNICOR. Contract Decor informed UNICOR that the longest it would take to deliver one of the fabrics was 6 weeks, and that the other fabric was in stock and ready for immediate delivery. Commercial reported that it could deliver one of the specified fabrics in 8 weeks and that delivery of additional quantities of the other fabric beyond the quantity it had in stock would take between 4 and 6 weeks. The other vendors UNICOR contacted had longer delivery times. UNICOR also reviewed price lists from Contract Decor, Commercial, and a third vendor.

Notwithstanding Contract Decor's higher prices and after determining that that firm was the only vendor which could deliver the specified fabrics to UNICOR by the required March 19 date, UNICOR, on February 15, issued Contract Decor purchase order Nos. 042-PID-0199-96-CS-00 and 042-PID-0198-96-CS-00 for the top treatments

and curtains, respectively.¹ The following day, UNICOR canceled the protested purchase orders previously issued to Contract Decor for the same requirements.

Commercial protested on February 23 against UNICOR's issuance of the new purchase orders to Contract Decor, again alleging that UNICOR had failed to make award to the vendor with the lowest FSS price. Commercial subsequently protested the propriety of UNICOR's issuance of the second set of purchase orders to Contract Decor because the alleged urgency used to justify these purchases was caused by UNICOR's improper issuance of the original purchase orders to other than the lowest-priced FSS vendor in the first place. After determining that delivery and installation of the draperies in time for the opening of the VA facility was an urgent and compelling circumstance which could not await a decision from our Office, UNICOR authorized Contract Decor's continued performance of the purchase orders in the face of the protest pursuant to FAR § 33.104(c)(2)(ii).

Under UNICOR's procedures for "procuring" draperies, UNICOR acts as a purchasing agent for the ordering agency and as such it must justify an FSS purchase at other than the lowest available price. See Southwest Decor, Inc., B-246964 et al., Apr. 20, 1992, 92-1 CPD ¶ 373. In this regard, when placing an order of more than \$2,500 from the FSS, a procuring agency is required to reasonably ensure that a selection represents the best value and meets the agency's needs at the lowest overall cost by considering reasonably available information about products offered under Multiple Award Schedule contracts. FAR § 8.404(b), (c); see Imaging Technology Corp., B-270124, Feb. 12, 1996, 96-1 CPD ¶ 68. This standard can be satisfied if the procuring agency reviews at least three vendor price lists. FAR § 8.404(b)(2)(i); see Southwest Decor, Inc., supra.

Here, UNICOR concedes that VA was under the mistaken impression that because it was ordering the draperies through UNICOR, it did not need to ensure that the FSS vendor it specified was the one that met its needs at the lowest price. The record shows that in specifying Contract Decor, VA failed to consider price lists from other vendors, but selected Contract Decor as the source for the draperies because of VA's favorable prior experience with that firm. Had VA or UNICOR reviewed other FSS vendors' price lists prior to UNICOR's issuing the original set of purchase

¹UNICOR also executed a justification and approval for other than full and open competition under FAR § 6.302-2--Unusual and Compelling Urgency--on the basis that the delay in contract performance resulting from the cancellation of the purchase orders in response to Commercial's earlier protests made it necessary for UNICOR to obtain the fabric from the only vendor capable of meeting the delivery time frame. UNICOR now maintains that, because it was ordering from the FSS, the justification and approval for other than full and open competition was unnecessary. We agree.

orders to Contract Decor, the agencies would have found that Commercial and at least one other vendor offered lower prices than Contract Decor for draperies that met VA's requirements. In this regard, UNICOR does not contend that the specified fabrics obtained through other FSS vendors would have failed to meet VA's needs in terms of quality or other features; indeed, the record indicates that the specified fabrics would be obtained by the vendors from a single source. Thus, in issuing the initial purchase orders, the agencies failed to reasonably ensure that the vendor selected met VA's needs at the lowest overall cost, as required by FAR § 8.404, and deprived other vendors, such as Commercial, of a reasonable opportunity to be considered for award.²

The issuance of the second set of purchase orders resulted from UNICOR's response to Commercial's protests. The record shows that had UNICOR and VA employed proper procedures in the first place in ordering from the FSS, UNICOR would not have had to issue the second set of purchase orders to Contract Decor at a higher price than offered by other FSS vendors on the basis that Contract Decor was now the only vendor able to meet the delivery time frame. For example, had the agencies reviewed Commercial's FSS price list prior to issuing the original purchase orders to Contract Decor, they would have found that Commercial has a delivery time of 56 days after receipt of order, compared with Contract Decor's 75 days, and, accordingly, Commercial would have been able to deliver the fabric to UNICOR well before the April 1996 installation date, which was then many months away.

As indicated and conceded by UNICOR, the record shows that Commercial's prior protests of the original purchase orders to Contract Decor were clearly meritorious, in response to which UNICOR stated that the orders placed would be canceled. However, prior to taking any corrective action, UNICOR issued the identical second set of purchase orders to the same vendor on the basis of urgency caused by the delays in performance resulting from Commercial's protests of UNICOR's improper placement of the initial purchase orders.³ Thus, UNICOR essentially allowed performance of these improperly issued purchase orders to continue, prompting

²We also note that without quotations from other vendors, the agencies were unable to avail themselves of possible price reductions from published schedule prices.

³Commercial then promptly filed a protest against the issuance of the second set of purchase orders, again alleging that UNICOR failed to issue the orders to the vendor with the lowest FSS price. When Commercial later learned that UNICOR had issued the second set of orders to the same vendor on the basis of urgency, Commercial supplemented its protest on the ground that the alleged urgency was the result of UNICOR's improper issuance in the first place of the previously protested purchase orders.

Commercial's subsequent protests. Under the circumstances, we sustain Commercial's protests.

Since UNICOR authorized Contract Decor's continued performance of the purchase orders in the face of the protest and performance has been completed, corrective action is not feasible. We recommend that Commercial be awarded the costs of filing and pursuing its protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1996). This includes Commercial's costs of filing and pursuing its protests of the initial purchase orders because, as described above, despite UNICOR's purported corrective action, its issuance of the second set of purchase orders essentially continued the impropriety on which the canceled initial orders were based, and in essence resulted in the protester's reinstating its initial protest grounds in pursuing the protests sustained here. See Commercial Energies, Inc.-- Recon. and Declaration of Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499. Commercial's certified claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 90 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

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